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# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 101

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

UNIVERSAL-RUNDLE CORPORATION

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

Respondent makes three arguments in support of the decision below directing the Federal Trade Commission to stay its cease-and-desist order and to conduct an industry-wide investigation of respondent's competitors. None of them will bear scrutiny.

1. Respondent first urges (Br. 12–18) that the action of the court of appeals was warranted because enforcement of the cease-and-desist order would subvert "the statutory purpose of protecting, rather than impairing the competitive opportunities of respondent, a small competitor at the seller level of competition" (Br. 15),[1] and that the Commission improperly

[1] Respondent's characterization of itself as a "small competitor" is based on an analysis that ignores respondent's relationship to Sears, Roebuck and Co. (R. 50 n. 4). More than 60 per cent of respondent's capital stock is owned by Sears, and a substantial proportion of respondent's production is sold to Sears.

failed to determine "[whether] the cease-and-desist order should not be stayed because any possible competitive impairment to respondent occasioned thereby would be outweighed by the adverse effects reasonably predictable in the secondary line if enforcement of the cease and desist order were to be delayed" (Br. 16).[1] We deny that the Commission is obligated to make that determination; but that question need not be reached because the record here does not establish that respondent would suffer significant injury if it were not permitted to continue its illegal price discriminations.

Respondent's petition for the withdrawal of the cease-and-desist order (R. 46–53) stated that its principal competitors were enjoying substantial profits (R. 51) whereas respondent had experienced losses during the preceding three and one-half years (R. 52). Respondent also submitted the affidavit of its marketing vice-president (R. 54–56) stating that "the Company may suffer further substantial financial losses if it must be the sole plumbing fixture manufacturer under an order to cease and desist."

The Commission did not ignore this material. On the contrary, it pointed out that "the fact that respondent may have incurred losses prior to the issuance of the order does not support the contention that enforcement of the order will cause it financial

[1] The Commission found that "the price differentials involved in this proceeding were sufficient to give the recipients of the lower prices a substantial advantage over their non-favored competitors" and therefore were likely to injure, destroy, prevent or substantially to lessen competition at the secondary level, *i.e.*, among respondent's customers (R. 40–44).

hardship" (R. 63). The Commission's conclusion that respondent had failed to make a substantial showing of prospective injury was amply supported by respondent's own argument to the Commission, in connection with the scope of the order, that its discriminatory practices were unique to the Philadelphia-Camden area—the area in which the existence of a differential between truckload and less-than-truckload prices had been proved. Respondent stated: "In the areas chosen by the Commission's counsel to present evidence there exists a special circumstance, *close proximity to respondent's plants*, and this circumstance simply does not occur throughout the balance of the country." (Appeal Brief for Respondent before the FTC, p. 56; emphasis in original). If, as respondent apparently suggests, it either cannot or does not engage in price discrimination "throughout the balance of the country," it is difficult to understand how respondent could suffer serious hardship by a general prohibition upon its granting such discriminations.

Under these circumstances, the Commission's rejection of respondent's prophecy of injury and its refusal to stay its order cannot be said to subvert the purposes of the Clayton Act.[2] On the other hand, the ruling of the court of appeals that respondent's "showing was sufficient to require the Commission to make petitioner's competitors parties" (R. 575) constituted an impermissible substitution of the court's

[2] The Commission's refusal to stay its order would not, of course, preclude respondent from seeking treble damages and injunctive relief against its competitors under Sections 4 and 16 of the Clayton Act.

own discretionary determination for that of the Commission. See *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 169.

2. Respondent's second argument is that the Commission patently abused its discretion by failing to investigate respondent's competitors, thereby "precluding itself from making a knowledgeable determination as to whether the order against respondent should have been enforced immediately or stayed" (Br. 8, 18–22). This argument rests on the contention that, under *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, "in a situation such as that which was present when respondent petitioned for a stay, the Commission has a *duty* to investigate and find out whether an allegedly illegal practice is in fact industry-wide in scope" (Br. 18–19; emphasis in original). In the light of respondent's petition for relief to the Commission, we assume that the contention must be that the agency was required both to conduct an investigation and to stay its order in the interval; respondent obviously was not merely seeking an investigation without a stay.[3]

[3] Although respondent now asserts (Br. 32, 38) that it never requested a stay pending the entry of orders against its competitors, its petition to the Commission requested the following relief: (1) "[A] temporary stay of the order to cease and desist pending the Commission's decision on the instant petition." (2) Withdrawal of the cease-and-desist order. (3) An order staying re-entry of the order (R. 46). The petition also suggested that the order not be re-entered for at least 18 months, and then only after 30 days notice to respondent (R. 46–47). Finally, the petition urged the Commission that the cease-and-desist order be stayed "pending *corrective action* of industry-wide practices of competitors" (R. 53; emphasis added). The term

But *Moog* clearly does not impose on the Commission any duty to conduct an industry-wide investigation. In *Moog* this Court recognized that the decision whether to make an order against a single firm effective "before others are similarly prohibited" involved "a variety of factors peculiarly within the expert understanding of the Commission." 355 U.S. at 413. In pointing out that the shaping of remedies "within the framework of regulatory legislation" is committed to the "specialized, experienced judgment" of the agency rather than to the courts, the Court listed several of such factors, including the determination whether allegedly illegal practices that appear to be industry-wide are in fact so extensive. But in giving this example the Court was not directing the Commission to conduct an industry-wide investigation whenever a respondent asserts that there is an industry-wide illegal practice. For the decision whether to do so—no less than the decision whether to stay an order against one firm in an industry pending the entry of orders against the others—lies "within the special competence of the Commission," which "alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." 355 U.S. at 413.

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"corrective action" would seem to imply discontinuance of illegal practices—either voluntarily or pursuant to order. Moreover, the decision of the court of appeals (R. 575) requires the Commission not merely to investigate respondent's competitors, but to make them parties to the proceeding before it—presumably through the issuance of complaints.

The Commission concluded in the present case that, since truckload discounts do not constitute a *per se* violation of Section 2(a), "the general allegation by respondent that its competitors are granting truckload discounts is not a sufficient basis for instituting industry-wide proceedings to condemn this practice nor is it a valid reason for withholding enforcement of the order entered against respondent in this matter" (R. 63). That conclusion did not, of course, preclude particularized investigations wherever complaints and information supplied by respondent or others indicated such investigation was warranted.[4] It did, however, reflect an exercise of the Commission's "specialized, experienced judgment." The way in which the Commission brings such judgment to bear upon a particular case involves the sum of the agency's "cumulative experience" (*National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349),[5] and obviously cannot be fully substantiated by "citation to the record" (Resp. Br. 21). In determining whether to commit its limited resources to any par-

[4] Pursuant to information subsequently received (see the Commission's main brief, App. C, p. 55), the Commission instituted an investigation of one of respondent's competitors. That investigation is now in progress. While respondent's petition before the Commission referred to six of respondent's competitors, respondent's vice-president identified some 17 competitors in his testimony before the hearing examiner (R. 112). While calling for an "industry-wide" investigation, respondent never expressed any view as to the pricing practices of 11 of 17 of its competitors.

[5] Respondent appears to recognize this, since it quotes (Br. 29) from the Commission's decision in *Atlantic Products Corp.*, 1963–1965 Trade Reg. Rep. ¶ 16,676 (transfer binder), where the Commission observed: "Responsible exercise of the

ticular investigation, the Commission cannot and need not spell out its mental processes nor itemize the experience and source of information that inform its discretion. See *United States* v. *Morgan,* 313 U.S. 409, 422.

Respondent's contention that the Commission was required to conduct an industry-wide investigation in order to make an informed judgment on whether to stay the order against respondent challenges the sufficiency of the information available to the Commission in formulating enforcement policy; it does not raise a question that is appropriate for judicial reexamination. If the respondent could, as it supposes, require the Commission to satisfy the courts that its decision not to proceed against respondent's competitors was adequately supported by identifiable data, the files and internal communications of the Commission would be the subject of continuous scrutiny and the courts would be obliged to assess the thoroughness and scope of prior investigations, the soundness of staff analyses and recommendations, and all the other factors informing the Commission's decision. It seems too clear for argument that no administrative agency could function on that basis. It is precisely for these reasons, we believe, that *Moog* held that the Commission's discretionary determinations are not to be overturned in the absence of a patent—*i.e.* self-evident—abuse of discretion. Respondent's allegation that the Commission was insufficiently informed when it re-

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Commission's discretion in determining whether, and when, not to enter an immediate cease and desist order * * * may involve consideration of circumstances going *beyond those reflected in the particular record*" (emphasis added).

fused to stay the order calls for an exploration of the Commission's cumulative experience and, therefore, is not the kind of claim upon which courts may overturn an agency's discretionary determination.

Respondent's assertion (Br. 22) that "[i]t is clear, very clear * * * that the Commission had *not* investigated to determine whether petitioner's competitors were also violating the law * * *" (emphasis in original), is thus quite irrelevant; it is also unwarranted. Between 1957 and 1961 the Commission conducted a comprehensive investigation of alleged violations of Section 2(a) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act by respondent's largest competitor, American Radiator & Standard Sanitary Corp., which it closed because it concluded that there was insufficient basis for issuing a complaint. Another factor, not reflected in the record but relevant to the Commission's decision, is the fact that, prior to the denial of respondent's stay application on August 4, 1964, the Commission was informed in confidence by the Department of Justice that the Antitrust Division was conducting an investigation of the Plumbing Fixture Manufacturers Association of which respondent and its principal competitors are members. The Commission, of course, normally treats such matters as confidential.[6] We mention them here only because they serve to refute respondent's charges and to indicate the inappropriateness—indeed the impossibility—of judicial reexamination of agency enforcement policy.

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[6] See Federal Trade Commission, *Organization, Procedures, Rules of Practice, and Statutes* §§ 1.12(d), 1.133 (1963).

3. Respondent's third argument (Br. 22–30) is that the Commission's refusal to stay its order was an abuse of discretion because contrary to the Commission's announced policy of proceeding against statutory violations on an industry-wide basis wherever appropriate. Respondent correctly points out that in recent years the Commission has become increasingly sensitive to the inefficiency and the potential unfairness of proceeding against a single offender in an industry in which violations are widespread or universal. In practice the Commission has attempted to determine, prior to the commencement of an adjudicatory proceeding, whether there is reason to believe that an unlawful practice, allegedly being pursued by one firm, is or is not a common practice of the industry. The procedure adopted by the Commission has been described by Commissioner MacIntyre:[7]

> The enforcement bureaus have been instructed that they are no longer to report to the Commission recommendations on single complaints without further advising as to whether the alleged unfair practice is general in the industry. If the alleged law violation is widespread, then the staff is expected to recommend some program and plan for dealing with the industry-wide nature of the problem.

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[7] Statement by Commissioner MacIntyre, *Some Criteria for Applying Industry-Wide Enforcement Measures Under the Robinson-Patman Act*, p. 3 (Sept. 25, 1965). A copy of Commissioner MacIntyre's statement has been lodged with the Court by respondent. See Chairman Dixon's testimony in *Hearings before the Subcommittee of the Senate Committee on Appropriations, Independent Offices Appropriations, 1966*, 89th Cong., 1st Sess. (1965) p. 323.

That procedure does not preclude the Commission from proceeding on an individualized basis when it deems that approach preferable. As the statements cited by respondent make clear, the Commission has not purported to bind itself to conduct industry-wide proceedings in every instance. Thus, Commissioner MacIntyre observed in the statement quoted above and cited by respondent (Br. 27, n. 8):

> It has been argued, and possibly with some logic, that to be completely fair the Commission should proceed simultaneously against all industry members suspected of violating the price discrimination act. Obviously, this is not possible in all cases where litigation is employed simply because of the Commission's restricted budgetary and manpower resources.

Similarly, Commissioner Jones, in the address quoted by respondent (Br. 27), also observed:[8]

> The Commission's case-by-case technique of law enforcement is of major importance in stopping law violations and defining through its decisions the conduct which it regards as violative of the statutes. It is also an imperative in maintaining respect for those laws and in achieving voluntary compliance with them.

In short, respondent's suggestion that the decision below "merely calls upon [the Commission] to con-

[8] Address by Commissioner Jones before the Bar Association of the District of Columbia (February 25, 1965) p. 4. This portion of Commissioner Jones' speech was quoted with approval in the opinion of the Commission in *Modern Marketing Service, Inc.* and *C. H. Robinson Co.*, Docket Nos. 3783, 4589 (January 7, 1966).

sistently apply the very policy which it has already been following" (Br. 29) rests upon a misunderstanding of that policy.

Furthermore, the proceeding against respondent arose in a context that fully warranted an individual rather than an industry-wide approach. As respondent has recognized (Br. for FTC, App. C, 41), "initially the investigation was entirely unrelated to the matter of truckload discounts." In its inception, the proceeding against respondent was a companion matter to a proceeding against Sears, Roebuck and Co.[9] The complaints against respondent and Sears, which were issued on the same day, charged that respondent supplied Sears, and Sears (owning a majority of respondent's capital stock) induced it to supply, plumbing-fixtures, under Sears' "Homart" brand, at lower prices than respondent sold such fixtures to other dealers under its own "U/R" brand, in violation of Sections 2(a) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, respectively. The complaint against respondent also charged it with price discriminations between different purchasers of its own "U/R" brand fixtures (R. 2–3). But it was not until July 1963, when the hearing examiner ruled (R. 484) that the "Homart" and "U/R" lines were not of like grade and quality, that the case against respondent settled into its present mold. Indeed, it was not until July 1965, after the case had been concluded and the cease-and-desist order had been entered, that respondent for the first time urged the Commission to proceed

[9] See *Sears, Roebuck and Co.* v. *Federal Trade Commission*, 210 F. Supp. 67 (D.D.C.).

against other plumbing fixture manufacturers. Against this background it is clear that originally the present proceeding was ancillary to the main case involving discriminations in favor of a single large retailer;[10] it was not, as the court below supposed (R. 573), an "attack against a general practice which is prevalent in the [plumbing fixture] industry." It is apparent, therefore, that the Commission's present policy of assessing at the outset the prevalence in an industry of an allegedly unlawful practice would have had little, if any, bearing on the conduct of this proceeding.

4. As we have noted above (p. 4), in determining not to stay its cease-and-desist order, the Commission in no way precluded respondent from supplying information and requesting the institution of proceedings against others,[11] and respondent has availed itself of the opportunity to do so. On April 19, 1965, however, Commission counsel advised respondent's counsel that a requested investigation of American Radiator & Standard Sanitary Corp. and The Kohler Co. could not be undertaken because the Commission had been advised that "such an investigation would conflict with an investigation now being conducted by the Antitrust Division" (Br. for the

[10] Sears, Roebuck's annual sales volume exceeds $3 billion.

[11] Section 1.12(a) of the Commission's General Procedures provides: "Any individual, partnership, corporation or organization may request the Commission to institute a proceeding in respect to any matter over which the Commission has jurisdiction."

FTC, App. C, p. 55). Respondent now derides the possibility of such conflict (Br. 36–41) and, indeed, implies (Br. p. 5, n. 2; App. C 4a–5a) that the supposed conflict was invented by the Commission to frustrate respondent's quest for justice.

The fact is that in March 1965 an investigation by the Antitrust Division into price-fixing in the plumbing fixtures industry had proceeded to the point that the Division had sought authorization to impanel a grand jury. Thereafter, a grand jury in the Western District of Pennsylvania returned two indictments [12] charging respondent, numerous other manufacturers and individuals with conspiring to fix prices. It was, therefore, hardly surprising that, on March 22, 1965, the Antitrust Division requested the Commission not to proceed with an investigation of American Radiator and Kohler, who were among the eventual indictees. Accordingly, respondent's suggestion that the denial of clearance was somehow feigned or fabricated is altogether groundless.

Also without merit is respondent's further contention that no real conflict existed between the Antitrust Division's investigation and the Commission's potential investigation because, without any danger of conferring immunity to prosecution on any of the prospective criminal defendants (under Section 9 of the Federal Trade Commission Act), the Commission could have investigated American Radiator and Kohler even if it could not have prosecuted them. In the first place, it is clear that a Commission inves-

[12] Criminal Nos. 66–295 and 66–296 (W.D. Pa.) returned on October 6, 1966.

tigation of American Radiator or Kohler that could not, if the evidence warranted, proceed to adjudicatory hearing would waste the Commission's resources and would fail to provide respondent with the relief it seeks, *i.e.*, the entry of cease-and-desist orders against its competitors.

More important, it is well known that the Commission and the Antitrust Division have a long-standing agreement under which they clear investigations with each other.[13] That agreement reflects a practical method of dealing with the overlapping jurisdictions of the two agencies so as to avoid duplication of effort and mutual frustration. The assessment of the risk of conflict in any particular case is obviously a matter of judgment and discretion and the accommodation reached between the agencies is not susceptible to judicial review. We do, however, note that the risks of frustration through immunization in this case are hardly as remote as respondent suggests. On February 17, 1967, respondent's former vice-president, Stanley S. Backner, a defendant in one of the pending price-fixing cases,[14] moved to dismiss the indictment as to him on the ground that:

> Defendant Backner, on October 15 and 16, 1962, testified as a witness for the Federal Trade Commission, in obedience to a subpoena issued by the Commission, in *In the Matter of Universal-*

[13] See *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 376 (1955).

[14] *United States* v. *American Radiator & Standard Sanitary Corp., et al.*, Crim. No. 66-295 (W.D. Pa.).

Respondent's counsel in the present case does not represent Mr. Backner in that proceeding.

*Rundle Corporation* (FTC Docket No. 8070). Such testimony concerned "transactions, matters, and things" for which he is being prosecuted on the instant indictment and he is therefore entitled under Section 9 of the Federal Trade Commission Act, 38 Stat. 722 (1914), 15 U.S.C. 49, to immunity from such prosecution.

The possibility of such claims of immunity demonstrates why caution is the course of wisdom where the possibility of interagency collision is real.

Respectfully submitted,

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